APPENDIX A

Opinion of the Court of Appeals for the Seventh Circuit in *In the Matter of: Navigant Consulting, Inc., Securities Litigation*, 275 F.3d 616 (7th Cir. 2001)

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 01-2311

In the Matter of: Navigant Consulting, Inc., Securities Litigation

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Appeal of: Charles L. Grimes and Gordon W. Chaplin, as Trustees under the Will of Louise C. Chaplin, *et al.*

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 99 C 7617 — Ruben Castillo, Judge.

Argued December 6, 2001
Decided December 26, 2001

Before CUDAHY, EASTERBROOK, and EVANS, Circuit Judges.

[275 F.3d 617]

EASTERBROOK, Circuit Judge. Only parties may appeal from judgments entered in federal litigation. See FED. R. APP. P. 3; *Marino* v. *Ortiz*, 484 U.S. 301 (1988). Because members of a class (other **[275 F.3d**

618] than the named representatives) are not automatically parties, they must intervene and acquire party status if they wish to appeal. See *Felzen* v. *Andreas*, 134 F.3d 873 (7th Cir. 1998), affirmed by an equally divided Court under the name *California Public Employees' Retirement System* v. *Felzen*, 525 U.S. 315 (1999). In this case class members who objected to approval of the settlement in a class action ignored that rule and attempted to appeal without becoming parties. After receiving a notice from our staff that there appeared to be a jurisdictional problem, the objectors returned to the district court with a motion to intervene. That motion was denied as untimely, precipitating this appeal from the denial of the motion to intervene — with a conditional appeal from the order approving the settlement. See *In re Synthroid Marketing Litigation*, 264 F.3d 712, 715-16 (7th Cir. 2001).

Intervention is possible only on "timely application". FED. R. CIV. P. 24(a), (b). Like the district court, we find it hard to see how a post-judgment motion could be timely. "Hard" differs from "impossible"; *United Airlines, Inc.* v. *McDonald*, 432 U.S. 385 (1977), holds that class members are entitled to intervene even after judgment, in order to pursue an appeal, if they do not learn until after judgment of the circumstance (the representative's abandonment of the class) that calls for intervention. Everything depends on the gap between the need for action and the taking of action. Thus, we held in *Crawford* v. *Equifax Payment Services, Inc.*, 201 F.3d 877, 880 (7th Cir. 2000), that "delay must be measured from the time the would-be intervenors learned (or should have known) of the representative's shortcomings." *Crawford*

added, as did *Synthroid*, that intervention should be freely allowed, if limited to the purpose of taking an appeal. But this attitude cannot abolish the requirement in Rule 24 that intervention be timely.

The objectors' appellate brief in this case gives no reason for their delay in moving to intervene. Pressed at oral argument, counsel supplied one: His ignorance of *Felzen* and its predecessors. This may be the explanation but is not a justification. Many deadlines confront counsel, from the statute of limitations to the 30-day period for taking an appeal, and failure to inform oneself of the procedural requirements is no excuse for ignoring them. Although the district judge might have deemed the explanation sufficient, *cf. Pioneer Investment Services Co.* v. *Brunswick Associates Limited Partnership*, 507 U.S. 380 (1993), the judge was not required to do this, and deferential appellate review of this discretionary decision can have only one outcome.

Indeed, these objectors probably should have intervened before the settlement was negotiated. The class representatives in these 21 consolidated actions alleged that Navigant Consulting violated the federal securities laws by making false statements, injuring investors in aftermarket trading. Like other actions of this sort, identifying injured traders required specifying the date when the price first was affected by the deceit and the date when the truth reached the market and the price adjusted to that news. The asserted fraud in this case was the use of pooling to account for four of Navigant's acquisitions, although generally accepted accounting principles prohibited the use of that method under the circumstances. (Pooling

has since been abolished by the accounting profession for all transactions after June 29, 2001. See FINANCIAL ACCOUNTING STANDARDS BOARD, STATEMENTS 141 and 142.) Navigant first **[275 F.3d 619]** released earnings using pooling early in 1999, and before the opening of the markets on November 22 of that year it announced that its accountants had questioned this treatment, that earnings might have to be restated, and that its senior officers had resigned or been discharged. The price of Navigant's stock dropped 45% (from $26.00 to $14.25 per share) that day. The class representatives sought recovery for investors who bought stock during 1999 before this disclosure and the precipitous decline. The objectors believe, however, that purchasers through January 24, 2000, when Navigant released its restated earnings, should be included in the class — even though the market rose when the restated earnings were announced. (The announcement on November 22 did not reveal the extent of the loss, and traders may well have assumed that if there were any good news this would have been stated. See Sanford J. Grossman, *The Informational Role of Warranties and Private Disclosure About Product Quality*, 24 J. L. & ECON. 461 (1981); Paul Milgrom & John Roberts, *Relying on the Information of Interested Parties*, 17 RAND J. ECON. 18 (1986). Not until January 2000 was the loss quantified, and because the worst had not come to pass the price rose.)

By August 2000 the objectors knew that the damages period proposed by the class representatives would close in November 1999, omitting some of their trades. That was the time to seek intervention, but the objectors did not. Instead they filed another class

action in September 2000, naming themselves as representatives, and sought to have this twenty-second suit consolidated with those already under way. The district court denied this motion. Denied this self-help role, the objectors then could have sought intervention or opted out and relied on their own class suit. But they did neither, waiting until May 4, 2001, to get the intervention process started. The district judge acted within his discretion in finding that this was too late for persons who had known for at least eight months about the aspects of the representatives' position to which they objected.

Anticipating that we might reach this conclusion, the objectors ask us to overrule *Felzen* and permit appeals by class members that have not become formal parties. That decision is not a candidate for reconsideration. The circuits are in conflict and will be no matter what we do. The ball is in another Court, which has indicated an inclination to take a new look at the subject. See *Scardelletti* v. *Debarr*, 265 F.3d 195 (4th Cir.), *cert. granted under the name Devlin* v. *Scardelletti*, No. 01-417 (2001 U.S. Lexis 10959 Dec. 10, 2001). That is the right forum for further debate.

Still, we cannot resist a few comments. Although other circuits see the question as one for policymaking by judges — the divided opinion in *Scardelletti* is a good example, with both the majority and the separate opinion explaining why in their view sound practice calls for one or another outcome — this court in *Felzen* took a more formal position. Appellate Rule 3 limits appeals to parties, and in *Marino* the Supreme Court enforced that requirement. Class members (other than the representatives) are not parties; if they were, their

citizenship would count for purposes of the complete-diversity requirement in suits under 28 U.S.C. sec.1332, yet it is established that class members' citizenship is disregarded. See *Smith* v. *Sperling*, 354 U.S. 91 (1957). Class members cannot have it both ways, being non-parties (so that more cases can come to federal court) but still having a party's ability to litigate independently.

[275 F.3d 620] Although several decisions (again *Scardelletti* is a good example) discuss the problem as if the question were whether class members have "standing" to appeal, we do not think that this is apt. Class members suffer injury in fact if a faulty settlement is approved, and that injury may be redressed if the court of appeals reverses. What more is needed for standing? See *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 561 (1992). Our point in *Felzen* was that parties are a subset of persons with standing. It is not enough to suffer injury; one must become a litigant by taking the necessary formal steps (such as filing a timely complaint, or here filing a timely motion to intervene and then a timely notice of appeal).

Observance of form has benefits, such as a reduction in uncertainty and the costs that uncertainty breeds. Intervention identifies with precision who is entitled to take what procedural steps, and when. It also may facilitate accurate decision on the merits. Our case shows how. The objectors say that because of fraud the price of Navigant's stock remained too high in the period between November 22, 1999, and January 24, 2000, and that investors who bought during these months should be entitled to a portion of the recovery. Intervention would have allowed the

court to explore that question: the class representatives and Navigant could have taken discovery from the objectors to learn just what trades they made, how these may have been influenced by lack of information in the market, and so on. Intervention and extra discovery might have led the judge to obtain the views of an expert in financial economics. But by remaining on the sidelines until after final decision in the district court, these objectors hobbled that inquiry and made the appeal a needlessly speculative venture.

By insisting on party status of appellants, then, we facilitate adjudication in district courts too. As we stressed in *Crawford* and *Synthroid*, it is vital that district courts use this formal rule to promote vindication of the class members' rights; that's why we insist that timely requests to intervene be freely granted. But these objectors tarried when their own deeds (especially their separate lawsuit) demonstrate that they understood the need for action.

The order denying the motion to intervene is affirmed, and the conditional appeal from the order approving the settlement is dismissed for want of jurisdiction.

APPENDIX B

Order of the Court of Appeals for the Seventh Circuit affirming denial of motion to intervene and dismissing conditional appeal in *In the Matter of: Navigant Consulting, Inc., Securities Litigation*, No. 01-2311 (7th Cir. December 26, 2001) (order)

United States Court of Appeals
For the Seventh Circuit
Chicago, Illinois 60604

JUDGMENT - WITH ORAL ARGUMENT

BEFORE: Honorable RICHARD D. CUDAHY, Circuit Judge
Honorable FRANK H. EASTERBROOK, Circuit Judge
Honorable TERENCE T. EVANS, Circuit Judge

No. 01-2311

APPEAL OF: CHARLES L. GRIMES and GORDON W. CHAPLIN, Objectors

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division
No. 99 C 7617, Ruben Castillo, Judge

The order denying the motion to intervene is affirmed, with costs, and the conditional appeal from the order approving the settlement is dismissed for want of jurisdiction. The above is in accordance with the decision of this court entered on this date.

APPENDIX C

Order of the Court of Appeals for the Seventh Circuit with respect to initial appeal in *In the Matter of: Navigant Consulting, Inc., Securities Litigation*, No. 01-1896 (7th Cir. April 24, 2001)

United States Court of Appeals
For the Seventh Circuit
Chicago, Illinois 60604

April 24, 2001

By the Court:

IN RE: NAVIGANT CONSULTING, INCORPORATED, SECURITIES LITIGATION

APPEAL OF: CHARLES W. GRIMES AND GORDON CHAPLIN

No. 01-1896

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division

No. 99 C 7617

Ruben Castillo, Judge

ORDER

A preliminary review of the short record indicates that the order appealed from may not be a final appealable judgment within the meaning of 28 U.S.C. § 1291.

Charles Grimes and Gordon Chaplin take an appeal from the final judgment in this case. Grimes and Chaplin, however, are not named plaintiffs and have not intervened in the case. Therefore, it does not appear that they have standing to appeal. See *Felzen v. Andreas*, 134 F.3d 873 (7th Cir. 1998); *aff'd. by an equally divided court sub nom. California Public Employees' Retirement System v. Felzen*, 525 U.S. 315 (1999).

Further, defendant Navigant Consulting filed a third-party complaint, but it does not appear that the district court entered an explicit order disposing of the third-party complaint. Any such appeal, therefore, would appear premature. Accordingly,

IT IS ORDERED that appellants shall file, on or before May 8, 2001, a brief memorandum stating why this appeal should not be dismissed for lack of jurisdiction. A motion for voluntary dismissal pursuant to Fed. R. App. P. 42(b) will satisfy this requirement. Briefing shall be suspended pending further court order.

NOTE: Caption document "JURISDICTIONAL MEMORANDUM." The filing of a Circuit Rule 3(c) Docketing Statement does not satisfy your obligation under this order.

APPENDIX D

Excerpt From Minute Order of the United States District Court for the Northern District of Illinois in *In the Matter of: Navigant Consulting, Inc, Securities Litigation*, Case No. 99 C 7617 (N.D. Ill. May 3, 2001)

(N.B.: The original is a printed form containing boxes to be filled in and checked; not suitable for full transcription; all relevant material is here included.)

Name of Assigned Judge or Magistrate Judge:
Ruben Castillo

Case Number: 99 C 7617

Date: 5/3/2001

Case Title:
In Re: Navigant Consulting, Inc. Securities Litigation

Enter Order. Parties' joint motion to certify final judgment pursuant to Fed. R. Civ. P. 54(b) is granted. The Order and Final Judgment and the Order Awarding Attorneys Fees and Reimbursement of Expenses to Counsel for the Class are amended as follows: This Court determines that the claims in the pending third party action are separate and distinct from the claims resolved in this Order and there is no just reason for delaying entry of this Order as a final judgment. Therefore, this Court directs that this Order be entered as a final judgment pursuant to Fed. R. Civ. P. 54(b).

Date docketed. May 7 2001

APPENDIX E

Order of the Court of Appeals for the Seventh Circuit granting voluntary dismissal of initial appeal in *In the Matter of: Navigant Consulting, Inc., Securities Litigation*, No. 01-1896 (7th Cir. May 8, 2001)

United States Court of Appeals
For the Seventh Circuit
Chicago, Illinois 60604

DISMISSAL PER FRAP 42(b)

Date: May 8, 2001

By the Court:

No. 01-1896

IN RE: NAVIGANT CONSULTING, INCORPORATED, SECURITIES LITIGATION

APPEAL OF: CHARLES L. GRIMES and GORDON W. CHAPLIN

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division
No. 99 C 7617, Ruben Castillo, Judge

Upon consideration of the MOTION TO DISMISS filed by the appellant on 5/7/01,

IT IS ORDERED that this cause is DISMISSED, pursuant to Federal Rule of Appellate Procedure 42 (b).

APPENDIX F

Oral Opinion of the United States District Court for the Northern District of Illinois in *Stearns* v. *Navigant Consulting, Inc.*, Case No. 99 C 7617 (N.D. Ill. May 9, 2001)

THE COURT: Well, all I will say is I agree with all that's been said. I think there are different ways to count the relevant time period. I've seen it counted in various ways by courts who are evaluating this, not the least of which is counting from the point in time that this case was first filed, people have to be on notice of their potential rights to [Tr. 9] intervene.

But certainly in this case, it goes even beyond November of '99 because the Grimes case finally was filed, and then there was an issue as to whether or not it belonged before this Court as a tag-along case or not, and that issue certainly was before the Court as of at least January of this year, where it became clear that the plaintiffs, in a filing that they made with me, made it clear that they had an objection to a conditional order of reassignment that I had entered in error when I thought that this was another case similar to various others that tagged along and were part of the class.

Once I realized that, we quickly undid the clerical order and made it plain that the Grimes case would stand alone and would proceed in front of I believe it's Judge Bucklo and that any rights that Grimes would have here would be totally dependent on intervention.

And I think the Seventh Circuit has made it plain that if you are planning to appeal any ruling, and you never know how the rulings are going to go, you need

to intervene at the earliest opportunity in order to take an appeal at some point.

And in this instance, I'm aided by the Seventh Circuit's very latest views on this because Judge Ripple issued an opinion on April 27th, just the other day almost, in a case called Vollmer, it's V O L L M E R, where the denial of an intervention in a class action case was upheld.

[Tr. 10] And in that case, the intervenors, the way I read this opinion from Justice Ripple, had attempted to intervene even before the class settlement was ever approved and certainly even during the final approval had attempted to intervene again and that was denied, and part of the reason the intervention denial was upheld on appeal was because of the Court of Appeals' decision to uphold the district court's conclusion that the intervention was untimely, that there had been undue delay, and there was prejudice.

When I look at that case that just came down from the Seventh Circuit which I have to believe represents their latest view, in view of this case, this is as untimely as it gets. When you know of a proceeding, you're involved in a proceeding, you are allowed to make objections throughout the proceeding and never having intervened, even though others, Genesis, for example, intervened in this case. So the litigants had to be aware that intervention was a way to have formal standing in case the objections were not successful. You can't just count on the fact that your objections are going to carry the day.

Now, aside from the delay, I also find that there would be undue prejudice in this case. I think it's

unfortunate as it is that certain defendants who have a right as parties are going to create some delay in the processing of these claims and getting some money back to the class in this case because that is what this class action has been all about [Tr. 11] from day one. And, nevertheless, those defendants have that right and they have a right to have that reviewed, and that review will occur I hope in an efficient manner.

But to add to that some further delay by someone who should have been aware of their intervention rights, somebody who's represented by competent counsel, and to further complicate the payments in this case I think would just be undue and unjust.

For all these reasons, I'm denying the what's styled as an emergency motion to intervene. Thank you.

APPENDIX G

Excerpt From Minute Order of the United States District Court for the Northern District of Illinois in *In the Matter of: Navigant Consulting, Inc., Securities Litigation*, Case No. 99 C 7617 (N.D. Ill. May 9, 2001)

(N.B.: The original is a printed form containing boxes to be filled in and checked; not suitable for full transcription; all relevant material is here included.)

Name of Assigned Judge or Magistrate Judge:

Ruben Castillo

Case Number: 99 C 7617

Date: 5/9/2001

Case Title:

In Re: Navigant Consulting, Inc. Securities Litigation

Emergency motion to intervene of class members Charles L. Grimes and Gordon W. Chaplin, Trustees under the will of Louise C. Chaplin, Charles L. Grimes and Gordon W. Chaplin, Trustees Under the Louise D. Catherwood Trust and Gordon W. Chaplin, Individual Trustee of the Jessica D. Catherwood Trust is denied for the reasons stated in open court.

Date docketed: May 10 2001

APPENDIX H

Statutes and Rules of Court Involved in the Case

Appendix H1

Federal Rules of Appellate Procedure — Excerpts From Rule 3

Rule 3. Appeal as of Right — How Taken

(a) Filing the Notice of Appeal.

(1) An appeal permitted by law as of right from a district court to a court of appeals may be taken only by filing a notice of appeal with the district clerk within the time allowed by Rule 4. At the time of filing, the appellant must furnish the clerk with enough copies of the notice to enable the clerk to comply with Rule 3(d).

* * *

(c) Contents of the Notice of Appeal.

(1) The notice of appeal must:

(A) specify the party or parties taking the appeal by naming each one in the caption or body of the notice, but an attorney representing more than one party may describe those parties with such terms as "all plaintiffs," "the defendants," "the plaintiffs A, B, et al.," or "all defendants except X";

* * *

(3) In a class action, whether or not the class has been certified, the notice of appeal is sufficient if it

names one person qualified to bring the appeal as representative of the class.

(4) An appeal must not be dismissed for informality of form or title of the notice of appeal, or for failure to name a party whose intent to appeal is otherwise clear from the notice.

* * *

Appendix H2

Federal Rules of Civil Procedure, Rule 23(e)

(e) A class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs.

Appendix H3

Federal Rules of Civil Procedure, Rule 24

Rule 24. Intervention

(a) Intervention of Right.

Upon timely application anyone shall be permitted to intervene in an action: (1) when a statute of the United States confers an unconditional right to intervene; or (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

(b) Permissive Intervention.

Upon timely application anyone may be permitted to intervene in an action: (1) when a statute of the United States confers a conditional right to intervene; or (2) when an applicant's claim or defense and the main action have a question of law or fact in common. When a party to an action relies for ground of claim or defense upon any statute or executive order administered by a federal or state governmental officer or agency or upon any regulation, order, requirement, or agreement issued or made pursuant to the statute or executive order, the officer or agency upon timely application may be permitted to intervene in the action. In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.

(c) Procedure.

A person desiring to intervene shall serve a motion to intervene upon the parties as provided in Rule 5. The motion shall state the grounds therefor and shall be accompanied by a pleading setting forth the claim or defense for which intervention is sought. The same procedure shall be followed when a statute of the United States gives a right to intervene. When the constitutionality of an act of Congress affecting the public interest is drawn in question in any action in which the United States or an officer, agency, or employee thereof is not a party, the court shall notify the Attorney General of the United States as provided in Title 28, U.S.C. § 2403. When the constitutionality of any statute of a State affecting the public interest is drawn in question in any action in which that State or

any agency, officer, or employee thereof is not a party, the court shall notify the attorney general of the State as provided in Title 28, U.S.C. § 2403. A party challenging the constitutionality of legislation should call the attention of the court to its consequential duty, but failure to do so is not a waiver of any constitutional right otherwise timely asserted.

Appendix H4

Relevant Portions of the Private Securities Litigation Reform Act of 1995 ("PSLRA") dealing with class notice, 15 U.S.C. § 78u-4(a)(7)

(7) Disclosure of settlement terms to class members

Any proposed or final settlement agreement that is published or otherwise disseminated to the class shall include each of the following statements, along with a cover page summarizing the information contained in such statements:

(A) Statement of plaintiff recovery

The amount of the settlement proposed to be distributed to the parties to the action, determined in the aggregate and on an average per share basis.

(B) Statement of potential outcome of case

(i) Agreement on amount of damages

If the settling parties agree on the average amount of damages per share that would be recoverable if the plaintiff prevailed on each claim alleged under this chapter, a statement

concerning the average amount of such potential damages per share.

(ii) Disagreement on amount of damages

If the parties do not agree on the average amount of damages per share that would be recoverable if the plaintiff prevailed on each claim alleged under this chapter, a statement from each settling party concerning the issue or issues on which the parties disagree.

(iii) Inadmissibility for certain purposes

A statement made in accordance with clause (i) or (ii) concerning the amount of damages shall not be admissible in any Federal or State judicial action or administrative proceeding, other than an action or proceeding arising out of 7such statement.

(C) Statement of attorneys' fees or costs sought

If any of the settling parties or their counsel intend to apply to the court for an award of attorneys' fees or costs from any fund established as part of the settlement, a statement indicating which parties or counsel intend to make such an application, the amount of fees and costs that will be sought (including the amount of such fees and costs determined on an average per share basis), and a brief explanation supporting the fees and costs sought. Such information shall be clearly summarized on the cover page of any notice to a

party of any proposed or final settlement agreement.

(D) Identification of lawyers' representatives

The name, telephone number, and address of one or more representatives of counsel for the plaintiff class who will be reasonably available to answer questions from class members concerning any matter contained in any notice of settlement published or otherwise disseminated to the class.

(E) Reasons for settlement

A brief statement explaining the reasons why the parties are proposing the settlement.

(F) Other information

Such other information as may be required by the court.